No. 1408

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN J. CAMBERS,
Plaintiff in Error,

vs.

THE FIRST NATIONAL BANK OF BUTTE,
(A Corporation)
Defendant in Error.

Writ of Error to United States Circuit Court,
District of Oregon.

Respondent's Brief.

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In the United States Circuit Court of Appeals.

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Plaintiff in Error,

vs.

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Defendant in Error.

RESPONDENT'S BRIEF.

The case made by the plaintiff, as shown by his amended complaint, stripped of unnecessary verbiage, briefly is this: The plaintiff, having initiated certain litigation in the courts of Montana which required him to furnish injunction bonds aggregating in amount $12,500, applied to Andrew J. Davis and George W. Andrews (who are nominally defendants to this action) to become his sureties on such injunction bonds. To indemnify them for having done so, the plaintiff deposited with the defendant, the First National Bank of Butte, the sum of $10,000. The litigation referred to resulted adversely to the plaintiff, and a judgment was rendered against the

said plaintiff Cambers, and also against Davis and Andrews, his sureties, upon the injunction bonds executed by the latter for the sum of $12,500. Notwithstanding the fact that plaintiff has not paid the judgment recovered against Davis and Andrews on the injunction bonds, and as appears from the amended complaint, Davis and Andrews have either paid or are still liable for the amount of such judgment, the plaintiff by his complaint in this action seeks to recover from the defendant, First National Bank of Butte, a mere naked stakeholder, having no interest whatever in the controversy referred to, and sustaining no relations to the parties, other than as just stated, the money so deposited with the defendant bank as indemnity to Davis and Andrews. No attempt has been made, and none can be made, as both are non-residents of the State of Oregon, to obtain jurisdiction of the defendants Davis and Andrews.

Plaintiff, endeavoring to state his cause of action in his amended complaint as strongly in his favor as possible, has not alleged, although such is the fact, (and it must be apparent to the court from the pleadings in the case), that the judgment rendered in the Montana case on the injunction bonds has been paid by the sureties, Davis and Andrews. Plaintiff has not alleged in his amended complaint, nor was it contended on the argument that he had paid off such judgment or that he had in any way

secured for the defendants, Davis and Andrews, a release of the liability that they had assumed for plaintiff in executing the injunction bonds, and it is apparent from the amended complaint that the obligations of Davis and Andrews on the injunction bonds signed by them still continue, unless they have released themselves by paying off the judgment. It is also clear that plaintiff's object in prosecuting this suit, is to recover back the moneys deposited by him as security for his bondsmen without securing a release of the liability assumed by them for his (plaintiff's) benefit, and that plaintiff is seeking to cast on the bank the burden of litigating some real or supposed equity that he fancies himself to have against the defendants, Davis and Andrews, which matter, however, in no wise concerns the defendant bank.

A demurrer was filed on behalf of the defendant bank to the amended complaint, because the same did not state facts sufficient to constitute a cause of action against said defendant. This demurrer, after argument and due consideration by the court, was sustained, and the action dismissed.

To enable the court to understand the case more readily, we shall proceed to set out the plaintiff's alleged cause of action as shown by his amended complaint a little more fully:

The deposit of the $10,000 with the defendant bank is shown under the terms of the agreement

alleged in the original complaint. It is then alleged that on March 20, 1902, a joint judgment was rendered in the District Court of Silver Bow County, Montana, in favor of William B. Hamilton and others against Cambers, Davis and Andrews for the sum of $12,500, based upon the injunction bonds already mentioned, and that by the terms of the contract under which said money was deposited with the defendant bank, the said sum of $10,000 should be held pending an appeal in said cause to the Supreme Court of the State of Montana; and if the defendants, Davis and Andrews, were required to pay said sum of $12,500, or any part thereof, they should reimburse themselves out of said fund; but if said defendants were not required to pay said judgment, or any part thereof, then the bank should return to Cambers said sum of $10,000.

It is further alleged that the appeal from the judgment in the injunction case was never perfected and that no appeal can now be taken therefrom, that an execution was issued upon said judgment and on the 21st day of August, 1902, while the execution was in full force and effect, the sheriff returned said judgment fully satisfied, and the clerk entered upon the judgment docket satisfaction of the judgment. It is further alleged that the defendants have not paid any part of the Montana judgment, that they are not liable thereon, and that the same cannot be enforced against them.

These are substantially the allegations of the amended complaint. It will be observed that there is no claim made that plaintiff has paid off the judgment recovered against Cambers and his sureties, but it is sought to avoid the effect of Davis's and Andrews's liability on such judgment, by alleging as a conclusion, without any facts to support it, **that said defendants are not liable on such judgment.** The sole ground for this conclusion is that the sheriff of Silver Bow County, Montana, had inadvertently returned the execution as fully satisfied and the clerk of the court had entered upon the judgment docket satisfaction of such judgment. By an inspection of the original complaint in this action it will be observed that the return of the sheriff and the entry of satisfaction was an inadvertence and that no money had been paid for the release of the judgment, and that by a subsequent order of court the return of the sheriff was amended and the satisfaction of the judgment vacated. The plaintiff cannot escape the legal effect of these facts by eliminating them from the amended complaint filed. (See Judge Bellinger's opinion, 133 Fed. 975.)

In the original complaint the defendant bank was the sole defendant. A demurrer was also interposed to this complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and also because of a defect of parties,—the complaint itself showing that Davis and Andrews were

indispensable parties to the litigation. The demurrer being sustained upon both grounds, the amended complaint was filed, from which many of the allegations contained in the original complaint were omitted, and to which complaint the names of Davis and Andrews were added, without any particular reference to them and without making any charges or allegations against them or seeking any special relief against them.

In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant.

4 Encyl. of Pl. & Pr., 746, 759.
39 Century Dig. Pl., Sec. 66.
Bartlett v. Prescott, 41 N. H. 493.
Hoag v. Warden, 39 Cal. 522.
Smith v. Buttner, 90 Cal. 95.
Stephens v. C. T. Co., 33 N. J. Law 229.

A pleading must state facts, not legal conclusions.

Mann v. Moorewood, 5 Sandf. (N. Y.) 557.
Losch v. Pickett, 36 Kans. 216.
Spargus v. Romin, 38 Neb. 736.
Gerrity v. Brady, 44 Ill. App. 203.
39 Century Dig. Pl., Sec. 12.

Payment of the amount of the debt for which an execution has issued, must be made to the execution

plaintiff or the proper officer. If an execution is returned as satisfied when for any reason there has been no satisfaction, the court may vacate the satisfaction and direct another writ to issue.

11 Am. & Eng. Encyl. Law, 713-4-5.

25 Am. & Eng. Encyl. Law, 780.

McCarthy v. O'Marr, 19 Mont. 215.

The return of a sheriff on an execution should be a concise statement of facts, showing what he had done in pursuance of his authority, and not conclusions of law. The regularity and legality of the acts of the sheriff should thus be made to appear.

17 Cyc. 1366-7.

ARGUMENT.

It seems hardly necessary to further discuss this case. The mere statement of it must be convincing that the plaintiff is entitled to no relief in a court of law against the defendant bank. The latter has no interest in the controversy between plaintiff and Davis and Andrews and is not involved in the acts and conduct upon which plaintiff bases his right to recover. The plaintiff must bring into court and litigate with the parties whose conduct he complains of and with whom he claims to have a controversy. Then, again, until plaintiff secures a release of the sureties upon the injunction bond signed for his benefit, or pays and secures satisfaction of the judgment rendered by the Montana court against Davis and Andrews, he is in no position to ask for the

return of the $10,000 deposited with the defendant bank. This is elementary, and involves a principle so familiar to the court that it is needless for us to cite authorities to sustain our contention.

Respectfully submitted.

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